



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-95-3

FACTS:

The Mayor's Special Commission on Health Care (Commission) was organized in June 1994. Its purpose is to advise the Mayor of the City of Boston (City) regarding the development of a proposal to merge Boston City Hospital and Boston University Medical Center Hospital. The Commission is structured to obtain input from interested constituencies, including the affected hospitals, organized labor, community health centers, and the business community, among others. As outlined in the Mayor's June 6, 1994 press release, the Commission's scope of work is as follows:

- (1) Work to create a model for a new and streamlined organization for the Department of Health and Hospitals;
- (2) Review Boston's health care delivery systems and make recommendations to the Mayor to create a closer affiliation or consolidation of services between the Department of Health and Hospitals and the Boston University Medical Center Hospital;
- (3) Monitor and assist in the implementation of approved recommendations in a timely fashion;
- (4) Make recommendations to the Mayor which would consolidate and make more efficient the management of both health care institutions;
- (5) Advise the Mayor on the future financial relationship between the City of Boston, the Department of Health and Hospitals and Boston University Medical Center Hospital;
- (6) Draft any local or state legislation necessary to accomplish the recommendations accepted by the Mayor.

During February 1995, the Commission held three public hearings "designed to provide a voice in the merger to anyone who is concerned."^{1/} The public hearings were "part of an ongoing process that has sought to solicit input from a wide variety of groups and individuals." The Commission has also held more than fifteen community meetings and forums throughout the City.

The Commission is headed by Patricia McGovern, former Chair of the Massachusetts Senate Ways and Means Committee. The other members of the Commission are: Robert Ciolek, Chief Operating Officer of the City of Boston; Thomas Traylor, Acting Commissioner of the Department of Health and Hospitals;^{2/} Elaine Ullian, Chief Executive Officer of Boston University Medical Center Hospital; John Cradcock, Director of the East Boston Neighborhood Health Center; Dr. Rev. Roy Hammond, Pastor of the Bethel A.M.E. Church; Jeanne Blake, former medical reporter for WBZ-TV, author and businesswoman; Celia Woislo, Executive Director of Local 285, Service Employees International Union (SEIU); Dr. Judy Ann Bigby, Assistant Professor of Medicine at Harvard Medical School; Dr. Deborah Scott, M.D., private practitioner; Dr. Alyce Adams, Harvard St. Health Center; and Dr. Hortensia Amaro, Boston University School of Public Health.

The Commission was created in the Mayor's discretion. There is no legislation, statute, ordinance, or executive order providing authority to create this body. The Commission is expected to meet and complete its recommendations to the Mayor by May 1, 1995.

According to the City's Corporation Counsel, the Commission's recommendations could be quite detailed (e.g., which hospital buildings or departments to retain, which debt to assume or not, etc.) Its work product is expected to include proposed draft legislation to implement these recommendations. Further, although the Commission lacks authority to bind the City, its recommendations are likely to embody those concepts on which the interested parties have reached consensus. It is the Mayor, however, who will decide whether to adopt the recommendations and present them to the City Council and the State Legislature for consideration.

QUESTION:

Are the non-City employee members of the Commission municipal employees within the meaning of G.L. c. 268A, §1(g)?

ANSWER:

No.

DISCUSSION:

In relevant part, the conflict of interest law defines "municipal employee" as a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis. G.L. c. 268A, §1(g). A "municipal agency" is any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. G.L. c. 268A, §1(f). Thus, the question is whether Commission members are persons "performing services for" a "municipal agency".

We have previously weighed the following four factors in determining what constitutes "performing services" for a municipal agency:

- (1) the impetus for creation of the position (whether by statute, rule, regulation or otherwise);
- (2) the degree of formality associated with the job and its procedures;
- (3) whether the holder of the position will perform functions or tasks ordinarily expected of employees, or will he be expected to represent outside private viewpoints;
- (4) the formality of the person's work product, if any. *See EC-COI-87-28; 86-5; 82-81.*

In general, where an advisory council has been created by statute, we have found that it is a government agency and its members government employees. *See, e.g., EC-COI-86-4; 82-157; 82-139.* The Commission, on the other hand, is created in the Mayor's discretion, a factor previously found to weigh against a finding that the body so created is a government agency. *See EC-COI-93-22* (Council created in the Governor's discretion is advisory in nature.) However, because no one factor is dispositive, we examine the Commission in light of the remaining three factors. *EC-COI-86-4.*

With regard to the degree of formality associated with the job, we have typically examined the body's organizational formality (often dictated by statute) and the formality of its work product. For example, in *EC-COI-86-5*, we found that an advisory committee to the Office of Real Property within the Division of Capital Planning and Operations was not a state agency in part because membership on the committee "[could] be fluid and [was] generally open." By comparison, we found that school advisory councils whose members are selected according to a statutory formula, whose meetings are subject to the Open Meeting Laws, and who must observe certain statutorily-mandated records retention procedure are municipal agencies. *EC-COI-93-21.*

In examining the Commission, we note that, except for the Chairperson and the two City employee members, Commission membership appears to be from a pool of citizens, chosen by the Mayor in his discretion, who represent various constituencies potentially affected by the merger.^{3/} There is no set procedure for their selection, or for the preparation and retention of the Commission's work product. The Commission is of limited duration. *EC-COI-79-12.* Any formality in its procedures is imposed by the Commission members (not by the

Mayor or by statute) apparently for the purpose of permitting the Commission to operate in an efficient and timely manner. *See EC-COI-86-5.*

We also conclude that the Commission does not perform tasks ordinarily expected of government employees, nor is its work product that ordinarily or uniquely expected of government employees. Crucial to our analysis in this area is whether the entity performs an advisory function (i.e., by providing outside viewpoints of use to government) or whether it performs an essentially governmental function by assisting in the work product of a government agency. Recently, for example, we concluded that a Council organized principally to provide the Governor with outside viewpoints concerning the Massachusetts economy and the status of industry in the Commonwealth is not a governmental body. *EC-COI-93-22*. We noted that, through the Council, “the Governor will have access to opinions and expertise which is not otherwise available within the executive branch.” On the other hand, we have said that an entity is a governmental agency where it assists government in carrying out a mandated function. *See, e.g., EC-COI-94-10; 86-4* (finding state agency status where permanent committee’s principal function is to assist in the drafting of regulations, a task ordinarily engaged in by public employees.)

The tasks performed by the non-municipal employee members of the Commission (other than the Chairperson) generally are: (1) articulating a merger structure which addresses the private interests they represent, (2) holding public hearings and meetings to solicit outside and community viewpoints, and (3) assisting in drafting proposed legislation to implement the Commission’s recommendation. Clearly, these functions are not “essentially governmental.” The mere fact that these tasks are performed collectively as members of a special commission does not transform the nature of the tasks to governmental functions. In the course of their Commission work, it is the private interests of the non-municipal employees, their employers and their constituencies that are being addressed. We would not say, for example, that an individual’s expression of these very same interests in the context of a business meeting is the performance of a governmental function. Furthermore, the public hearings, community meetings and forums conducted by the Commission elicit the type of outside viewpoints which we have traditionally found to advise and inform government in a manner not generally available through its employees. *See, e.g., EC-COI-93-22*. Moreover, the drafting of proposed legislation (as contemplated here) is not, in our view, “ordinarily or uniquely expected of government employees.” *Id.* Thus, none of the tasks performed by the non-municipal employee members of the Commission are essentially governmental in nature.

We note that the Commission’s Chairperson plays a slightly different role as she is neither a municipal employee nor a representative of an interested party or constituent group. However, the Chairperson, like the other Commission members, lacks authority to bind the City. Her role, to the extent that it differs from the roles played by the other non-municipal employees, appears to be that of a facilitator and a spokesperson for the Commission. These functions, however, are not essentially governmental in nature. Most importantly, the Chairperson does not appear to be discharging a duty imposed on any government official or agency. *Compare EC-COI-94-10.*

In summary, we conclude that where, as here, the Commission is formed in the Mayor’s discretion, is composed of members of constituencies likely to be affected by the proposed merger, and is designed to surface the private interests involved and to provide the Mayor with non-binding outside viewpoints not otherwise readily available to him, the Commission is not a “municipal agency” and its members are not “municipal employees” within the meaning of the conflict law.

DATE AUTHORIZED: April 11, 1995

¹Comments of the Commission Chairperson, press release, Office of the Mayor, February 3, 1995.

²Mr. Traylor replaced former Commissioner of Health and Hospital Lawrence Dwyer, who resigned on March 30, 1995.

³Public employee membership on an advisory group is not dispositive of its status as a government agency. *See, e.g., EC-COI-93-22.*